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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/880,199	06/13/2001	Cornelis Theodorus Verrips	F7544(V)	6098

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EXAMINER	
HENDRICKS, KEITH D	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 07/18/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 09/880,199	Applicant(s) VERRIPS, CORNELIS THEODORUS	
	Examiner Keith Hendricks	Art Unit 1761	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 10 July 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☒ The period for reply expires 5 months from the mailing date of the final rejection.
   b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: _____.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____
13. ☐ Other: _____.

09/880,199
Attachment to Advisory Action

Applicant's arguments have been considered but are not deemed persuasive, as the rejections were and are maintained for the reasons of record.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See In re Van Geuns, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

At page 3 of the after-final response, applicant states that "in conclusion, Meister et al. do not describe a single embodiment wherein a composition is prepared that, as a result of pasteurization effectively taking place, actually fulfills the requirement that the bacteria are rendered non-viable and that no substantial fermentation of the obtained food product will occur after addition of said non-viable bacteria to the food product." This is not deemed persuasive for the reasons of record. Applicant may allege this, however, this does not accurately reflect the claimed invention, and thus does not directly pertain to the teachings of the reference, as well. The claimed invention specifically requires that "no substantial fermentation of the food product by said Lactobacillus bacteria will take place by said non-viable bacteria." Contrary to applicant's argument, the claims do not exclude further acidification after addition of said non-viable bacteria to the food product (for example, by other bacteria in the composition), but rather only exclude such acidification as done "by said non-viable bacteria" alone.

Regarding applicant's comments at pages 3-4 of the response, that the spray drying process of the reference would not amount to pastuerization, this is not deemed persuasive for the reasons of record. Initially, it is noted that none of the instant claims actually require pasteurization. Claim 25 recites "the method according to claim 24 wherein the non-viable bacteria are obtained by pasteurization in line for 30 seconds at 72oC." At best, claim 25 provides for the use of a product-by-process component; i.e. claim 25 provides a mode by which the bacteria utilized in the method of claim 24 are produced, yet this does not impart an actual method step limitation to the claims. In other words, the recitation of claim 25 does not provide an additional pasteurization step, and thus as stated previously on the record, if the prior art structure (the spray dried bacteria) is capable of performing the claimed process and would reasonably meet the claimed property limitations, which it does, then the claim is anticipated as stated. In other words, utilizing a bacteria pasteurized in line for 30 seconds at 72oC would not appear to patentably differ from those bacteria disclosed and utilized in the reference.

Applicant is reminded of the after-final status of the application. Any amendments requiring a new search and/or consideration would not be entered at this juncture.

KEITH HENDRICKS
PRIMARY EXAMINER